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No. 99-699

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

BOY SCOUTS OF AMERICA, ET AL.,

Petitioners,

v.

JAMES DALE,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

BRIEF IN SUPPORT OF THE PETITIONERS BY *AMICI CURIAE*, JOHN J. HURLEY AND THE SOUTH BOSTON ALLIED WAR VETERANS COUNCIL

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QUESTIONS PRESENTED FOR REVIEW

Whether a court can, relying on a public accommodation statute, compel a private and intimate organization to admit someone to membership who promotes a message in direct contradiction of the organization's core principles?

Whether it is permissible for a court to declare one point of view in a public debate concerning Political and moral issues to be the "correct" view and to then circumscribe the expressive and associational abilities of those who espouse the view which that court deemed to be "wrong"?

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BRIEF IN SUPPORT OF THE PETITIONERS BY *AMICI CURIAE*, JOHN J. HURLEY AND THE SOUTH BOSTON ALLIED WAR VETERANS COUNCIL

Amici submit that the ruling of the Supreme Court of New Jersey below, 160 N.J. 562, 734 A.2d 1196 (1999), presents an unconstitutional application of the New Jersey Law Against Discrimination ("LAD") to petitioners Boy Scouts of America ("BSA") and Monmouth Council, BSA. In keeping with First Amendment jurisprudence regarding the rights of expressive and intimate association within private organizations, see, e.g., *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), *amici* urge this Court to reverse the decision of the New Jersey Supreme Court

STATEMENT OF CONSENT

Pursuant to Rule 37.3 of the Rules of this Court, *amici* have obtained the written consent of each of the parties to the filing of this brief.

INTRODUCTION AND STATEMENT OF INTEREST OF *AMICUS CURIAE*

As the defendants in *Hurley*, the *amici* are concerned that the rights they secured for themselves and other private organizations in the unanimous decision of this Court will be eroded if the decision of the New Jersey Supreme Court is allowed to stand. In 1995, John Hurley and the South Boston Allied War Veterans Council successfully petitioned this Court for reversal of an unconstitutional application of a Massachusetts anti-discrimination law that would have compelled Mr. Hurley and the Council to include in their annual St. Patrick's Day Parade, against their wishes, governmentally compelled messages and viewpoints. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., supra.* Citizens for the Preservation of Constitutional Rights, Inc. is a conservative and libertarian non-profit organization committed to pursuing constitutionai causes. *Amici* believe that the Court's holding in *Hurley* compels a decision in favor of BSA in the instant case.

STATEMENT OF THE CASE

The BSA is a many faceted organization. Although large, the operative, important units are very small (troops and patrols with as few as six to eight scouts). The several functions and missions of the BSA are important and vital to the whole: there is a religious component, a teaching component and a strong over-

all emphasis in shaping the moral character of young boys.

This controversy involves the control by government of the speech, associative rights, associative expression and viewpoints of a private organization.

The BSA has been required by the court below to include a scout leader who has acknowledged his intention to proselytize unwanted viewpoints within the BSA.

BSA is a private, non-profit organization whose mission is to instill within growing boys those virtues it considers integral to sound adulthood and to the expression of good citizenship. Many Scouting activities involve exploring and appreciating the outdoors, "[b]ut Scouting is far more than fun in the outdoors, hiking, and camping. Scouting is a way of life. Scouting is growing into responsible manhood, learning to be of service to others." *The Official Boy Scout Handbook* 9 (9th ed. 1979).

Before a boy can become a Scout, he must satisfy his Scoutmaster that he "[u]nderstand[s] and intend[s] to live by the Scout Oath or Promise, the Scout Law, the Scout motto, and the Scout slogan."[1] *Id.* at 11. Scout leaders likewise must "[a]gree to live by the Scout Oath and Law" before they can serve, see *The*

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[1] The Scout Oath states "On my honor, I will do best to do my duty to God and my country and to obey the Scout Law; to help other people at all times, to keep myself physically strong, mentally awake, and morally straight." The Scout Law states "A Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent." The Scout motto is "Be Prepared," and the Scout slogan is "Do a good turn daily." BSA prefers to instruct its members as to what *should* be done, not as to what should *not* be done. The founder of Scouting, Robert Baden-Powell, initially considered including an additional point in the Scout Law, "A Scout is not a fool," but discarded it in the view that the Law should be a catalogue of affirmative virtues. The Official Boy Scout Handbook 515 (9th ed. 1979).

Scoutmaster Handbook 3 (1998), and they are expected to set "an example for themselves and for others by living the Scout Oath and Law to the best of their abilities." *Id.* at 6.

Because much BSA activity is instructional in nature, the Scoutmaster serves as a teacher and role model to the boys in his troop. The Scoutmaster Handbook advises the potential leader that "[t]he Scouts in your troop will look up to you for guidance on a number of levels, many of them unspoken. The way you treat others, provide leadership, and act during meetings and on Scout outings will influence Scouts' actions." *Id.* at 3. Although his mentoring duties are most often executed in other areas of Scouting, the Scout leader's teaching and role model responsibilities occasionally extend to the arena of sexuality. BSA instructs its leaders in such circumstances to promote a message of sexual abstinence until marriage, in accordance with the "morally straight" provision of the Scout Oath. *See id.* at 132. When further questions arise, leaders are instructed to "answer them as honestly as [they] can and, whenever it is appropriate, encourage him [the Scout] to share his concerns with his parents or guardian, spiritual leader, or a medical expert." *Id.*

In 1990 Dale became co-president of the homosexual student group at Rutgers University. Since that time he has openly affirmed his "being proud about [his] status as a gay man." Deposition of James Dale, May 10, 1993, at 93.

I. ARGUMENT

A. The Court Below Restructured The Speech Of A Private Organization Which In That Court's View Is "Wrong," In Order To Produce An Expression Which That Court Deems To Be More Appropriate

(i) BSA's Message of Moral Fitness

In *Hurley*, the trial judge in the Massachusetts Superior Court based his decision to restrict the First Amendment Rights of the organizers of the South Boston Saint Patrick's Day parade on his belief that the parade organizer's attitude on inclusion of a homosexual protest group in their parade was based on bigotry and that the veterans' parade fell within the Massachusetts public Accommodation Act. *Hurley*, 515 U.S. at 562. The Massachusetts court went on to order the parade organizers to include a group and its message in their parade. *Id.* The New Jersey Supreme Court has ordered the BSA to alter its message after concluding its beliefs were based on prejudice. *Dale*, 160 N.J. at 618.

Scouting is a "values-based program with its own code of conduct." *The Scoutmaster Handbook* 10 (1998). The principles of BSA are found in the Scout Oath and Law, and all Scouts and Scout leaders are expected to live according to them. *See* Statement of the Case, *supra*. Some of BSA's activity involves development of boys' outdoorsmanship skills, including camping, hiking, and cooking, but Scouting's founder Robert Baden-Powell made clear the higher purpose of Scouting: "Don't let the technical outweigh the moral. ... [C]amping, hiking, good turns, jamborees ... are all means, not the end. The end is character. Character with a purpose." *Curran v. Mount Diablo Council of BSA*, 29 Cal. Rptr. 2d 580, 584 (Cal. Ct. App. 1994), *judgment aff'd, opinion superseded by* 17 Cal. 4th

670, 952 P.2d 218 (Cal. 1998). *See also Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) ("Even the training of outdoors survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."). Even the New Jersey Supreme Court acknowledged that BSA "expresses a belief in moral values and uses its activities to encourage the moral development of its members." 160 N.J. at 613, 734 A.2d at 1223.

BSA teaches Scouts to be persons of good character in all aspects of their lives, including that of sexuality. Scouts are expected to adhere to a standard of sexual morality that emphasizes abstinence before marriage: "When you live up to the trust of fatherhood your sex life will fit into God's wonderful plan of creation. Fuller understanding of wholesome sex behavior can bring you lifelong happiness." *The Official Boy Scout Handbook* 525 (9th ed. 1979).[2] The *Handbook* also provides the following principles of responsibility in relation to "true [sexual] maturity":

> Your Responsibility to Young Women
>
> Your Responsibility As a Future Parent
>
> Your Responsibility to Your Beliefs
>
> Your Responsibility to Yourself

The Boy Scout Handbook 376–77 (11th ed. 1998). Inherent in BSA's teachings is adherence to a limitation on sexual activity to within a traditional marriage. *See id.*

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[2] The *Handbook* continues: "A moment of so-called sexual freedom can turn into a lifetime of regrets. 'The good life that could have been' is wrecked for many unwed teenagers burdened by babies for whom they are unable or unready to shoulder full responsibility of parenthood." The Official Boy Scout Handbook 525 (9th ed. 1979).

BSA's view of sexual morality is promoted through "quiet persuasion, inculcation of traditional values, instruction of the young, and community service." *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring). This view is neither "strident, contentious, [nor] divisive," *id.*, but it is nonetheless an important message at the very core of Scouting's mission to develop men of good character.

(ii) Respondent Dale's Message Would Subvert BSA's Own Message

Mr. Dale has stated publicly that he disagrees with BSA's moral position on homosexuality and that he "owe[s] it to the organization to point out to them how bad and wrong this policy is." Dara N. Sharif, *Gay, Expelled Scout Sues to Regain His Membership Cites N.J. Anti-bias Law*, Rec. N. N.J., July 30, 1992, at A3. Dale has also counseled Scouts about being homosexual. David Schwab, *Scout's Honor*, Star-Ledger (Newark), July 30, 1992. These statements confirm that Dale, if re-admitted to BSA, would propound a competing message of sexual morality antithetical to that of BSA.

(iii) BSA's Message is Protected by the First Amendment Guarantee of Freedom of Speech

The right to express freely one's own beliefs or ideas, regardless of their popularity, is essential to "nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). In compelling BSA to admit Dale to membership, the government compelled a revision of BSA's message and has violated "the most basic guarantee of the First Amendment—that citizens, not the government, control the content of public discussion." *Roberts*, 468 U.S. at 634 (O'Connor, J., concurring). If government were "freely

able to compel . . . speakers to propound . . . messages with which they disagree, [then] protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion). Finally, "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Hurley*, 515 U.S. at 575.

In the present case, the New Jersey Supreme Court's interpretation of the LAD has compromised BSA's freedom to present a message of sexual morality consistent with BSA's understanding of its own long-standing principles. The New Jersey Supreme Court's assertion that its "reinstatement of Dale does not compel the Boy Scouts to express any message" fails to recognize that BSA regards its adherence to traditional notions of morality and good character as fundamentally important. *Dale*, 160 N.J. at 624, 734 A.2d at 1229. Dale's "manifest views" on homosexuality are "at odds" with the position taken by BSA. *Hurley*, 515 U.S. at 581.

The New Jersey Supreme Court's denial of BSA's freedom of speech is contrary to this Court's holding that government is "not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579. The court below interjected its own interpretation of the Scout Oath and Law's requirements that a Scout be "morally straight" and "clean," asserting that they do not "express anything about sexuality." *Dale*, 160 N.J at 614, 734 A.2d at 1224. Nothing could be more inconsistent with First Amendment principles than for the state to deny an organization its free speech rights on the reasoning that the organization does not accurately understand its own philosophy. A state decision to allow or disallow speech based on the perceived social or political propriety of the message "grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis." *Hurley*, 515 U.S. at 579. Furthermore, "[d]isapproval of a private speaker's statement does not legitimize the use of the [state's] power to compel the speaker to alter the message by including one more acceptable to others." *Hurley*, 515 U.S. at 581.

(iv). BSA Has a Right To Refrain From Conveying Respondent Dale's Message

The Scout Oath and Law present a positive set of values by which to live, rather than a litany of prohibitions. *See* Statement of the Case, *supra*. The same is true of Scouting's message on sexual morality. Rather than focus on conduct that is not morally straight, Scouting promotes a positive message, emphasizing marriage and fatherhood. BSA prefers not to discuss homosexuality explicitly, see *id.*, but it may nonetheless exclude Dale as advocating a message with which it disagrees.

This Court unanimously affirmed in *Hurley* that "all speech inherently involves choices of what to say and what to leave unsaid." *Hurley*, 515 U.S. at 573 (quoting *Pacific Gas & Electric*, 475 U.S. at 11). A crucial "manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Id.* (internal quotations omitted). A speaker has the right to tailor his speech as he sees fit, including "expressions of values, opinion, or endorsement, [as well as] statements of fact the speaker would rather avoid." *Id. See also West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995).

Like the parade organizers of *Hurley*, BSA has the right to determine its own message. Dale would use the machinery of the state to commandeer BSA and promote a contrary message. Dale has stated publicly he is proud of his homosexuality, that he disagrees with BSA's moral position on homosexuality, and that he "owe[s] it to the organization to point out to them how bad and wrong this policy is." Sharif, Part I.B., *supra*. BSA disagrees with Dale's position on this matter and has chosen not to adopt a view consistent with Dale's. In doing so, BSA has made the "choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575. Finally, although the "size and success" of BSA "make[] it an enviable vehicle for the dissemination of" Dale's "views, . . . that fact, without more, would fall far short of supporting a claim that petitioners enjoy an abiding monopoly of access to spectators." *Hurley*, 515 U.S. at 577–78.

If a single self-identifying banner in a multifarious parade triggers constitutional protection, surely appointment of a person "whose *manifest views* [are] at odds with a position taken by the club's existing members," *Hurley*, 515 U.S. at 581 (emphasis added), constitutes an intrusion worthy of similar protection. *See Roberts*, 468 U.S. at 623 ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire").

B. The Court Below Improperly Based its Determination of Whether an Expressive Association is Protected by the First Amendment on the Court's Approval of the Association's Beliefs, Morals, and Values

(i) BSA Is An Inherently Expressive Organization

BSA is an expressive association. Scouting's purpose of instilling traditional notions of morality and good citizenship in its members is expressive and thus entitled to constitutional protection from state interference. *See Roberts*, 468 U.S. at 636 (O'Connor, J., concurring) ("The purposes of an association, and the purposes of its members in adhering to it, are doubtless relevant in determining whether the association is primarily engaged in protected expression"). The choice of a leader is a particularly expressive decision, the expressive quality of which goes far beyond the communication of specific explicit messages.

The New Jersey Supreme Court suggested that the Oath and Law are mere platitudes, serving no genuine purpose of selectivity. *See Dale*, 160 N.J. at 599, 734 A.2d at 1216. Notwithstanding the court's condescending attitude toward the virtue-building mission of BSA, however, the principles of the Oath and Law reside at the core of Scouting's effort to build men of good character and citizenship.[3] This goal is not secondary. *The Boy Scout Handbook* 164 (11th ed. 1998).

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[3] The depth and purposeful meaning of the Scout Oath and Law are discussed by Brian Burrell in *The Words We Live By: The Creeds, Mottoes, and Pledges That Have Shaped America*. He writes, "[t]he ideal of personal honor within a principled society is nowhere better represented than by the Boy Scout Laws, which comprise perhaps the best-known code of ethics." Brian Burrell, *The Words We Live By* 120 (1997). Burrell concludes that the Scout Oath and Law "are the very preconditions of civility, of good citizenship." *Id.* at 121. Similarly, Burrell notes that *The Boy*

Infrequently candidates do refuse to accept Scouting principles when first joining, but BSA will expel members who, after admission, explicitly or implicitly reject those principles. Scouts are not perfect all the time, nor are they required to be. BSA sets high ideals for its members in the expectation that Scouts constantly strive to recognize those ideals in their lives. When a Scout's conduct demonstrates a sustained rejection of BSA's core principles, however, expulsion of that member becomes necessary to preserve the integrity of the BSA message. BSA consistently revokes the membership of individuals who present a message antithetical to its own.

(ii) BSA Is Protected By Freedom of Expressive Association

Like-minded individuals form expressive associations for the purpose of promoting shared ideas, values, and philosophies. The First Amendment protects such groups from state-imposed inclusion of others who do not share their fundamental beliefs. *See Minnesota State Bd. For Community Colleges v. Knight*, 465 U.S. 271, 288 (1984) ("the First Amendment guarantees the . . . freedom to associate *or not to associate* with whom [members] please") (emphasis added). Freedom of association presupposes the "freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 122 (1981). The criteria for membership in an expressive association are themselves expressive and constitute the identity of the organization. See *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring) ("Protection of the association's right to define its

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Scout Handbook itself has been praised as a work of "permanent social and psychological consequence." *Id.* at 44 (quoting Paul Fussell).

membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice").

BSA is an expressive association. "The purposes of an association, and the purposes of its members in adhering to it, are doubtless relevant in determining whether the association is primarily engaged in protected expression." *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring). Scouting's purpose of instilling traditional notions of morality and good citizenship in its members is expressive and thus entitled to constitutional protection from state interference. The choice of a leader is a particularly expressive decision, the expressive quality of which goes far beyond the communication of specific explicit messages.

There can be few more effective ways to frustrate Scouting's promotion of traditional notions of morality than to admit vocal opponents of that message as members, and especially as leaders, into the organization. As the court in *Curran* acknowledged, the "forced inclusion of a Scout Leader who has publicly acknowledged his or her homosexuality and has expressed beliefs contrary to the Boy Scouts' view . . . would substantially impact the [BSA's] ability to get across its preferred message in its preferred way." *Curran*, 17 Cal.4th at 683, 952 P.2d at 226 (quoting the trial court). The New Jersey Supreme Court should not be able to circumvent First Amendment protections by asserting that its forced inclusion of Dale would have no effect on BSA.

This case is distinguishable from the *Roberts* trilogy cases. Therein the Court rejected First Amendment challenges to state public accommodation laws because the reasons posed by the challengers for exclusion were insufficiently related to views advanced by the organizations. See *Roberts*, 468 U.S. at 627, (finding that the statute "require[d] no change in the

[organization's] creed" and "impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members"); *New York State Club Assn. v. City of New York*, 487 U.S. 1, 13 (1988) (law erected no obstacle to "a club seek[ing] to exclude individuals who do not share the views that the club's members wish to promote"); *Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (statute did "not require the clubs to abandon or alter" any expressive activities).

The BSA is not required to have specific, taxonomic views on sexuality. *Hurley* teaches: "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." 515 U.S. at 569-70. BSA need not present a "narrow, succinctly articulable message [as] a condition of constitutional protection . . . ." *Id.* at 569. The New Jersey Supreme Court's restricted interpretation of "shared goals," however, would circumscribe constitutional protection under freedom of expressive association to pure advocacy groups and unseemly entities such as the Ku Klux Klan. *See Invisible Empire, Ku Klux Klan v. Mayor et al. Of Thurmont*, 700 F.Supp. 281, 288-89 (D. Md. 1988) [need parenthetical here]. BSA's view on homosexuality need not be its singular or primary purpose in order to be protected. It is sufficient is that BSA has a message of morality with which Dale disagrees.

This Court has clearly indicated that associational freedom is of fundamental importance in checking governmental control over citizens' expression of ideas. *See Hurley*, 515 U.S. at 579 (noting that if the "point of applying the state law to expressive conduct" is to produce neutral expressive conduct, "it is a decidedly fatal objective"). Even regulation having an

incidental impact on associational freedom is permitted only in "narrowly defined circumstances." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982). To justify even limited regulation of associational activity, the state must advance an interest that is both "compelling" and "unrelated to the expression of ideas." *Roberts*, 468 U.S. at 623.

New Jersey can claim no compelling state interest in applying the LAD outside the commercial context. The *Roberts* trilogy addressed commercial settings and recognized "radically different constitutional protections for expressive and nonexpressive associations." *Roberts*, 468 U.S. at 638.[4] Furthermore, the New Jersey courts' application of the LAD to BSA is directly related to the expression of ideas. Compelling BSA to accept Dale is to give more credence to his moral views than those of BSA, an unconstitutional application of the state law to an expressive association. As noted by a justice of the California Supreme Court, "the *Hurley* decision raises grave doubts whether [a] Legislature could ever constitutionally enact, or this court enforce, a law requiring an organization like the Boy Scouts, whose mission is to instill in boys a certain philosophy or moral behavior, to admit an individual who advances contrary views." *Curran*, 17 Cal.4th at 727, 952 P.2d at 256 (Kennard, J., concurring). Even if New Jersey has a legitimate interest in promoting Dale's views on sexual morality, the First Amendment prohibits the state from conscripting a private organization to serve as a mouthpiece for those views. The right of an expressive association to dictate its own standards of membership cannot be

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[4] *See Roberts*, 468 U.S. at 638 (O'Connor, J., concurring) ("The First Amendment is offended by direct state control of the membership of a private organization engaged exclusively in protected expressive activity, but no First Amendment interest stands in the way of a State's rational regulation of economic transactions by or within a commercial association.").

based on the state's approval or disapproval of the association's beliefs. *See Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974).

C. The New Jersey Supreme Court Improperly Denied BSA Its Freedom of Intimate Association

In *Roberts*, the Court addressed the concept of intimate association in relation to one's constitutionally afforded liberty. On behalf of the Court, Brennan, J., opined that:

> the constitutional shelter afforded [intimate] relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to the concept of liberty.

468 U.S. at 619. Associations sufficiently intimate to deserve this Constitutional protection include those that have "played a critical role in the culture and tradition of the Nation by cultivating and transmitting shared ideals and beliefs," *id.* at 618–19, as well as those involving "the raising and education of children." *Id.* at 619. Other factors include "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* at 620. The intimate nature of members' association within BSA justifies the heightened constitutional protection afforded such relationships.

(i) "Relative Smallness"

Although the total national membership of BSA at any particular time is quite large, most Scouting is done within small groups of boys and adult leaders:

"Scouting units are small, intimate groups. In the Cub Scout and By Scout programs, the units are made up of even smaller groups, dens and patrols, which often meet regularly in private homes." *Rules and Regulations of the Boy Scouts of America*, Article XI, Section 3, Clause 8, *quoted in* Scoutmaster Handbook at 138. BSA members are organized into local groups called troops, chartered to local community organizations. A typical troop consists of fifteen to thirty boys, see *Dale*, 160 N.J at 609, 734 A.2d at 1221, but many troops are smaller. Dale's troop, for example, consisted of only ten Scouts. *See* David Schwab, *Scout's Honor*, Star-Ledger (Newark N.J.), July 30, 1992. Troops are further subdivided into patrols, which contain six to eight boys. *See* Boy Scout Handbook 17 (11th ed. 1998). The patrol is the core unit around which a Scout's activities are centered. *The Official Boy Scout Handbook* 12 (9th ed. 1979).

(ii) "Selectivity"

BSA consists of a large number of boys from diverse backgrounds, but admission to membership is not without the exercise of discretion. To characterize BSA as unselective disregards an important manifestation of selectivity this Court has emphasized, a "plan or purpose of exclusiveness." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969). BSA is selective in requiring all candidates for membership to "understand *and agree to live by* the Scout Oath ... [and] Law." *The Boy Scout Handbook* (11th ed.) at 4 (emphasis added). Those who refuse to accept the Oath and the Law are not permitted to join. *See, e.g., Welsh v. BSA*, 993 F.2d 1267 (7th Cir. 1993) (excluding a boy for failing to profess his "duty to God"). Individuals have been dismissed from BSA for multiple reasons, including atheism, see *id.*, possession of alcohol or illicit substances, see *Boy Scout Handbook*

(9th ed. 1979) at 131, and advocating views antithetical to BSA's principles. *See* Ness, *Scouts Expel Longtime Leader*, *supra* (Scout leader dismissed for contesting BSA's views on religious observance, homosexuality, and female membership). As the Seventh Circuit observed, "[i]n order to maintain [its] principles, it is essential that [BSA] exercise selectivity." *Welsh*, 993 F.2d at 1276.

(iii) "Deep Attachments and Commitments ... Personal Aspects of One's Life"

The nature of the Scouting experience gives rise to close, personal relationships. Scouts hike together, cook together, camp together, pray together, and work together. *See, e.g., The Boy Scout Handbook* (11th ed.) at 129 (prayer), 216 (camping), 247 (cooking). They meet in one another's homes for patrol meetings. *See* Part V.A., *supra*. They develop personal moral values, the desire to be good citizens, and reverence for religious beliefs. *See* Statement of the Case, *supra*. Scouting is much more an extension of home, church, and friendship than it is of the commercial or public sphere.

This Court has declined to accept the notion that constitutional protection under intimate association is restricted to familial relationships. *See Board of Directors of Rotary, Int'l*, 481 U.S. at 545 ("Of course, we have not held that constitutional protection is restricted to relationships among family members."). If BSA is constitutionally indistinguishable from a Rotary chapter, however, as held the New Jersey Supreme Court, one is left with precious little idea of what non-familial organization would classify for constitutional protection under the doctrine of intimate association. There are few Rotary meetings conducted in pup tents.

(iv) "Child Rearing and Education"

Scouting is invested with a fundamental educational role in its efforts to instruct growing boys in matters of good character, citizenship, and skill in the outdoors. The Scoutmaster Handbook inquires "Is Scouting educational? You bet it is. Scouts have many opportunities to learn skills of leadership, of the outdoors, and of life." Scoutmaster Handbook at 7. Scout leaders are expected to embrace the educational aspect of Scouting, as "a Scout troop is an extension of [the boys'] school activities, their families, and their religious affiliations. For [some boys], a Scout troop might serve as the most stable part of their lives." *Id.* at 126. Scouts often spend significant lengths of time away from their homes with their fellow Scouts and their Scout leaders, for example, at outdoor activities and summer camps.

Parents and guardians have the right "to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925). This includes choosing both their children's teachers and the subjects of instruction. *See Meyer v. Nebraska*, 262 U.S. 390, 403 (1923); *Pierce*, 268 U.S. at 534. Parents choose to enroll their sons in BSA as much to expose them to the message and values promoted by BSA as to grant them the outdoor experiences Scouting offers. If BSA is compelled to alter its core organizational principles by action of government fiat, it will be unable to teach those values it regards essential to Scouting and will, furthermore, depart from the standard of adherence to traditional morality it has represented for decades both parents of Scouts and to the community at large.

II. SUMMARY

Under the rule of *Hurley*, "a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." 515 U.S. at 581. *Amici* Hurley and the South Boston Allied War Veterans Council believe that the instant case mirrors the situation foreseen by the Court five years ago and urge the Court to grant relief to the Boy Scouts of America and to dismiss Respondent's underlying complaint.

As the Court stated in *Roberts*, "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." 468 U.S. at 623. In the instant case, the State of New Jersey, acting through its judiciary, seeks to compel Boy Scouts of America to change its messages and viewpoints.

III. CONCLUSION

Therefore the decision of the New jersey Supreme Court in *Dale v. Boy Scouts of America, et al.*, 160 N.J. 562, 734 A.2d 1196 (1999) should be reversed.

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Respectfully submitted,

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